No. 242129

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

CLIFTON R. OLIVER

Appellant

OPENING BRIEF OF APPELLANT

ON APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT
BEFORE THE HONORABLE TARI S. EITZEN.

LANA C. GLENN
WSBA# 17858
W. 1309 DEAN, STE. 100
(509) 326-2840
Counsel for Appellant
CLIFTON R. OLIVER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER

I. ASSIGNMENTS OF ERROR

1. THE TRIAL COURT ERRED BY REFUSING TO INSTRUCT THE JURY WITH THE DEFENDANT'S PROPOSED INSTRUCTION OF NO DUTY TO RETREAT.

2. THE TRIAL COURT ERRED WHEN IT RULED THAT THERE WAS NO SUBSTANTIAL AND COMPELLING BASIS FOR AN EXCEPTIONAL SENTENCE DOWNWARD.

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. DID THE TRIAL COURT ERR BY REFUSING TO INSTRUCT THE JURY WITH THE DEFENDANT'S PROPOSED INSTRUCTION OF NO DUTY TO RETREAT?

2. WHETHER THE TRIAL COURT ERRED WHEN IT RULED THAT THERE WAS NO SUBSTANTIAL AND COMPELLING BASIS FOR AN EXCEPTIONAL SENTENCE DOWNWARD.

III. STATEMENT OF THE CASE

An Information was filed on November 17, 2004, which charged Clifton Dwayne Oliver with the following:

> SECOND DEGREE ASSAULT, committed as follows: That the defendant, CLIFTON DWAYNE OLIVER, in the State of Washington, or about October 28, 2004, did intentionally assault ERIC J. ANDERSON, and thereby recklessly inflict substantial bodily harm. (CP 1-1)

On April 4, 2005, the court heard various pretrial motions. (RP 3) Specifically, of import, the defense objected to the use of the defendant's mug shot taken when he was arrested. (CP forthcoming as an Exhibit) At that time, Mr. Oliver had no or little hair, but ny the time of trial, he had grown out his hair. The defense argued that a mug-shot photo was not relevant because identification was not at issue where a defendant is asserting a self-defense claim. Additionally, the defense argued that witnesses had identified Mr. Oliver at a show up, and not through a photo montage or line up; therefore, showing a witness a booking photo of Mr. Oliver was not relevant. (RP 9) The court articulated its concern that if a witness stated that the defendant had a bald head, but then the defendant appeared in court and was not bald, the jury might make an inference that the defendant was the wrong suspect. The court chose to reserve ruling on the admissibility of the photo until the proper situation presented itself.

(RP 10)

The State commenced its case in chief with the testimony of Jose Louis Najer. Mr. Najer testified that he, Erik Anderson, Nick Pintler, and Michael Roll were at Trickshot Dixie on the night of October 28, 2004. (RP 64) They arrived around 10:30 p.m. and left around 1:00 a.m. Mr. Najera testified that while he was at Trickshot Dixie's he had six or seven beers. When the group left, Mr. Najera was trying to catch up with them. As they walked westbound down Sprague Ave, Mr. Najer saw a man approach the group and then he heard a "big old crack". Mr. Anderson fell to the ground and Mr. Najera saw blood coming from his nose and face. Mr. Najera testified that Mr. Anderson did not say anything to the assailant before the altercation. Mr. Najera identified Mr. Oliver as the assailant in court. (RP 66-70)

According to Mr. Najera after Mr. Anderson fell to the ground, bouncers at Trickshot Dixie's detained Mr. Oliver momentarily and asked him why he did it. Mr. Najera heard Mr. Oliver state that Mr. Anderson stepped on a beer can which splashed beer all over his green Cadillac. (RP 71)

After the police arrived, both Mr. Najera and Mr. Roll were taken by the police to identify the suspect at a show up. At the show up, Mr. Najera identified Mr. Oliver as the individual who assaulted Mr. Anderson. (RP 73-74)

Mr. Erik Anderson testified that he could only recall heading towards the exit at Trickshot Dixie's and waking up in the emergency room. He sustained various injuries which resulted in his having trouble remembering things and experiencing difficulty with school work. (RP 93)

During cross-examination, defense counsel asked Mr. Anderson if he read a report by Dr. Hamner which stated that Mr. Anderson appeared not to have sustained any cognitive impairment as a result of the injury, to which the prosecution objected, based on hearsay grounds. (RP 100) (The parties approached the bench. Defense counsel argued that it was not offering the report for the truth of the matter asserted, but rather to show Mr. Anderson's state of mind. The court ruled that if defense wanted to get the medical report in, they must bring in a medical expert.)

Mr. Michael Roll testified for the State. (RP 106) He was with Mr. Anderson the night of the alteration at Trickshot Dixie's. Mr. Roll could not remember how many drinks he had that night. (RP 109) Mr. Roll testified that when the group exited Trickshot Dixie's, he recalled that Mr. Anderson stepped on an empty beer can and continued walking down Sprague Avenue. (RP 112) Then he saw a guy get out of a vehicle and stand by it for a few seconds. The guy started running up along the side of Mr. Anderson and hit him. According to Mr. Roll, Mr. Anderson fell to the ground, and the assailant just remained standing

over him. Mr. Roll testified that before Mr. Anderson was knocked to the ground, nobody did or said anything to the assailant. (RP 112-113, 128)

At this point during Mr. Roll's testimony, the prosecution asked Mr. Roll if he could identify the assailant in court. Mr. Roll answered that he could not recognize the face. (RP 113)

In further describing events, Mr. Roll testified that he was taken to a show up. He testified that during the ride over, he noted that he knew what the suspect was wearing. At the show up, Mr. Roll saw the same clothing on the suspect and made a positive identification. (RP 119) However, during his testimony on direct, when Mr. Roll was shown a photo of Mr. Oliver at the time of arrest, he could not recognize the person in the photo. (CP forthcoming) (RP 122)

On cross-examination, Mr. Roll indicated that he did not know where the police took him for the show up because he was drunk. Mr. Roll was not sure if the suspect was dark-skinned or light-skinned because Mr. Roll was drunk at the time of the incident. Mr. Roll also testified that during the altercation, two other African-American males stepped into the situation. He did not know whether these males were associated with the assailant at the time. (RP 130-134)

Officer Beau Brannon testified that he was called to Trickshot Dixie's to respond to an assault. According to the officer, both men were intoxicated. (RP

143-144) After taking their statements, Officer Brannon drove to Officer Bishop's location where the suspect was held. (RP 147) The officer stated that witnesses told him that the defendant was upset over beer getting spilled on his car. (RP 150-152)

On cross examination, Officer Brannon recalled that Mr. Najera told him that there was some pushing after Mr. Anderson was hit and that Mr. Najera saw two other men get into the car of Mr. Oliver as he drove away. (RP 156)

Officer Derek Bishop took the stand for the State. Officer Bishop was on patrol the night of the altercation at Trickshot Dixie's. He heard on the radio that there was an assault at Trickshot Dixie's and that a green Cadillac with a license plate number left the scene. Officer Bishop proceeded to Sharpe and Division to see if he could locate the vehicle. He noticed a dark-colored vehicle moving northbound on Division turning onto Desmet Street. Officer Bishop followed the vehicle. Officer Bishop made contact with the driver to see if any intoxication was involved. He noticed that the plates on the green Cadillac matched those described over the radio. At this point Officer Bishop radioed the other officers stating that he had made contact with the defendant and that they should bring any witness to his location. At the show up, both witnesses identified Mr. Oliver as the suspect in the assault. The prosecution then presented a photograph of Mr. Oliver from the night of his arrest, which Officer Bishop identified to be that of

Mr. Oliver. (CP forthcoming) The prosecution published the photograph to the jury, over a somewhat ambiguous, as the record reads, "standing objection"by the defense. (RP 159-166) The state and defense then agreed to take witnesses out of order. (RP 170)

Mr. Jemell Cuthbert, testifying for the defense stated that at the time of the incident, he was buying a hot dog outside of Trickshot Dixie's, and when he turned around he saw beer splashed over the side of Mr. Oliver's car. Mr. Cuthbert saw Mr. Oliver exit the car and approach Mr. Anderson to inquire why Mr. Anderson had kicked the beer can at his car. According to Mr. Cuthbert, when Mr. Oliver contacted Mr. Anderson, Mr. Anderson took a swing at Mr. Oliver and missed. Mr. Oliver swung back at Mr. Anderson, hitting him, and then Mr. Oliver got back into his car and drove off. (RP 172)

On cross examination, Mr. Cuthbert was asked about a certificate regarding what he saw that night. Defense counsel objected on the grounds that it exceeded the scope of direct, which was denied, based on the court's reasoning that it would be more efficient to have Mr. Cuthbert testify on this issue rather than having the prosecution recall the witness the following next day. (RP 177-179) Mr. Cuthbert, in this certificate, stated that he observed that Mr. Oliver was acting paranoid that night and that he got very angry when the beer was splashed on his car. (RP 181)

The State then resumed its case with the testimony of Dr. Rita Mellem, who treated Mr. Anderson the night of altercation, testifying as to his injuries. (199-207)

Officer Dean Draper, who was also on the scene with Officer Brannon, was called by the defense. (RP 235) Officer Draper testified that he did not talk to the bouncers at the club that night, but he recalled that Mr. Roll told him that Mr. Anderson kicked an unopened beer can that night which sprayed over the Cadillac. The defense then rested. (RP 239-240)

Both parties then discussed jury instructions outside of the province of the jury. (RP 243) The defense objected to the Court's denial of the proposed lesser included charge of third degree assault. Defense counsel argued that one cannot intentionally assault somebody and thereby recklessly inflict substantial bodily injury. (RP 246) The court refused the proposed instruction and instructed the jury with Instruction Number 8 which read as follows:

> Instruction No. 8:
>
> To convict the defendant of the crime of assault in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 28th day of October, 2004, the defendant intentionally assaulted Eric J. Anderson;
> (2) That the defendant thereby recklessly inflicted

substantial bodily harm on Eric J. Anderson; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty. (CP 63-84)

The defense proposed the following Instruction on the lesser included offense which read:

A person commits the crime of assault in the third degree when under circumstances not amounting to assault in the second degree he or she with criminal negligence causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm or with criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering. (CP 28-44)

The defense also took issue with the Court's rejection of the no duty to retreat instruction (WPIC 17.05) arguing that it was prejudicial to give a primary aggressor instruction without giving the no duty to retreat instruction. (RP 247) Mr. Oliver's proposed no duty to retreat instruction stated:

It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat. (CP 28-44)

After hearing arguments, the Court issued its ruling. The Court did not give the lesser included offense because the Court believed nothing in the evidence would support a negligent theory. The court also rejected the no duty to retreat instruction because it believed that Mr. Oliver was the aggressor and it would be unduly confusing to the jury. (RP 249)

The Court instructed the jury accordingly. (RP 250) After deliberations, the jury found Mr. Oliver guilty of the crime of second degree assault. (CP 85)

On May 17, 2005, the sentencing hearing was held. (RP 300) Defense counsel argued that because Mr. Oliver was under federal probation, it should not count as a point. Secondly, defense argued that a prior conviction of first degree robbery and third degree assault merged and only one point should result from these convictions. (PR 304) However, the parties then agreed that Mr. Oliver's offender score was a 6 for purposes of sentencing. (RP 307)

At sentencing, the defense moved for an exceptional sentence downward, arguing that Mr. Oliver is schizophrenic, a condition which was a substantial contribution to his behavior. Furthermore, on the night of the assault, Mr. Oliver was off his medications. (RP 308-310)

Mr. Oliver spoke and discussed his remorse for hitting Mr. Anderson. Mr.

Oliver also spoke about his terrible experiences that lead up to the night of the assault. (RP 328)

The Court found no mitigating reasons or circumstances to warrant an exceptional sentence downward. The Court considered Mr. Oliver's personal situation and found that it probably did contribute to his behavior but did not ultimately excuse it. (RP 333) (Emphasis added). The Court sentenced Mr. Oliver to 38 months, which is in the middle range for such a conviction, $500 victim assessment, and restitution. (RP 334)(CP 166-178)

Mr. Oliver timely filed a Notice of Appeal seeking appellate review of the conviction and judgment and sentence on June 7, 2005. (CP 181-184)

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IV. LEGAL ARGUMENT

I. THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY ON THE DEFENDANT'S PROPOSED INSTRUCTION OF NO DUTY TO RETREAT.

The Court of Appeals reviews the trial court's decision to reject a proposed jury instruction for an abuse of discretion. State v. Picard, 90

Wn. App. 890, 902, 954 P.2d 336 (1998). Jury instructions satisfy the requirement of a fair trial when, taken as a whole, they properly inform the jury of the applicable state law, are not misleading, and permit the defendant to argue his theory of the case. State v. Tili, 139 Wn.2d 107, 126, 985 P.2d 365 (1999).

A party is entitled to have the court instruct the jury on its theory of the case if evidence exists in the record to support the theory. State v. Mark, 94 Wn.2d 520, 526, 618 P.2d 73 (1980);. State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). Absence of an element from the instructions renders the verdict less than complete and the judgment is reversible. State v. Daniels, 87 Wn. App. 149, 154-55, 940 P.2d 690 (1997).

A person has no duty to retreat when a person is assaulted in a place where he or she has the right to be. State v. Studd, 137 Wn.2d 533, 549, 973 P.2d 1049 (1999). A criminal defendant is entitled to a "no duty to retreat" instruction when there is evidence that the defendant was assaulted in a place where he was lawfully entitled to remain and, in the absence of the instruction, the jury could conclude that flight would have been a reasonably effective alternative to the defendant's use of force in self defense. For purposes of the rule that a "no duty to retreat" instruction need not be given if the defendant alleging self defense

retreated from the encounter, the fact that the defendant was "backing up" at various times does not constitute "retreat" if the defendant's movements were more in the nature of the "ebb and flow" of a street fight. State v. Williams, 81 Wn. App. 738, 915 P. 2d 739 (1996), citing State v. Allery, 101 Wn. 2d 591, 598, 682 P. 2d 312 (1984).

A defendant is entitled to a "no duty to retreat" instruction when there is sufficient evidence in the record to support it. Studd, 137 Wn.2d at 549. The "no duty to retreat" instruction is proper when a possibility exists that a jury may objectively conclude that retreat is an effective alternative than the use of force of self-defense. State v. Redmond, 150 Wn.2d 489, 494-495, 78 P.3d 1001 (2003).

Looking at State v. Williams, supra, the court set forth the following: In Washington, one who is assaulted in a place he has a right to be has no duty to retreat. Allery, supra at 598. Flight, however reasonable an alternative to violence is not required. While the wisdom of such a policy may be open to debate, the policy is one of long standing and reflects the notion that one lawfully where he is entitled to be should be made to yield and flee by a show of unlawful force against him. See W. LAFAVE & SCOTT, JR., CRIMINAL LAW & 5.7(f), at 160-161 (2d. Ed. 1986). State v. Williams, supra at 743-744.

> In the absence of the "no duty to retreat" instruction, a reasonable juror could have believe that .... could have erroneously concluded that the

> brothers used more force than was necessary because they did not use the obvious and reasonably effective alternative of retreat. Thus, we clarify the rule, and hold that where a jury may conclude that flight is a reasonably effective alternative to the use of force in self-defense, the *no duty to retreat* instruction should be given. Williams, supra at 744-745.

The Court, in Williams went further in stating that under the circumstances of that case:

> Such an error can be considered harmless if the court is convinced beyond a reasonable doubt that nay reasonable jury would have reached the same result despite the error. State v. Aumich, 126 wn./ 2d 422, 430-431, 894 P. 2d 1325 (1995). An instructional error is harmless if it is trivial, formal or merely academic and in *no* way affected the outcome of the case. State v. McCullum, 98 Wn. 2d 484, 497, 656 P. 2d 1064 (1983). However, as we have discussed, a reasonable juror may well have concluded on this record that the failure of the defendant to retreat constituted an excessive use of force. Thus, failure to instruct the jury that ... had *no duty to retreat* was not harmless. We must therefore reverse both convictions. Id.

Likewise, in Redmond, the Supreme Court concluded that not including the "no duty to retreat" instruction was prejudicial error of the trial court. Redmond, supra at 497. In Redmond, the defendant got into a fight in the high school parking lot. The defendant claimed self-defense when the victim stepped forward with clinched fists. During the fight, the defendant broke his victims's

jaw and the defendant was charged with second degree assault. The surrounding circumstances of the fight indicated that victim was standing between the defendant and the defendant's car. Id. at 492. The prosecution argued that the defendant could have reasonably retreated instead of fighting the victim. The Supreme Court reversed and remanded stating the "no duty to retreat" instruction is appropriate when the jury may objectively conclude that flight is a reasonable effective alternative to the use of force in self-defense. Id.

Here, in Mr. Oliver's case, the jury should have been given the instruction of "no duty to retreat" along with the court's self-defense instruction. Failure to so instruct the jury is prejudicial error. The facts in the record strongly suggest that Mr. Oliver was entitled to the instruction of "no duty to retreat".

Here, Mr. Oliver was in a place where he was entitled to be. Mr. Oliver was reacting at a minimum to an attempted assault by Mr. Anderson, who apparently missed his target. Mr. Cuthbert testified that Mr. Anderson took a swing at Mr. Oliver first. (RP 172) Therefore the facts suggest that Mr. Oliver was entitled to the "no duty to retreat" instruction.

The "no duty to retreat" instruction should be given to a jury when there is a danger that the jury could objectively conclude that flight was a reasonable alterative to self-defense. Redmond, 150 Wn. 2d at 492. The prosecution suggested to the jury that Mr. Oliver could have retreated because he hit Mr.

Anderson from behind. Thus, absent the instruction, a juror could reasonably have concluded that since Mr. Anderson was turned around he posed little threat to Mr. Oliver and that flight was a more reasonable alternative than self-defense. Testimony indicated that there was some distance between Mr. Anderson and Mr. Oliver. Absent the requested instruction, the jury could have concluded that given the distance between two individuals, flight was a more reasonable alterative than self-defense. Similarly in Redmond, the prosecution planted in the minds of the jury that flight was a reasonable alternative to the use of force. Therefore, the trial court should have included the "no duty to retreat" instruction. Failure to include the instruction was prejudicial error.

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2. THE TRIAL COURT ERRED WHEN IT RULED THAT THERE WAS NO SUBSTANTIAL AND COMPELLING BASIS FOR AN EXCEPTIONAL SENTENCE DOWNWARD.

The Sentencing Reform Act of 1981 states clearly that a "sentence within the standard range for an offense shall not be appealed." RCW 9.94A.210(1) However, a sentence within the standard range may be appealed "where the court

has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range." State v. Garcia-Martinez, 88 Wn.App. 322, 330, 944 P.2d 1104 (1997), *review denied*, 136 Wn.2d 1002, 966 P.2d 902 (1998).

A court refuses to exercise its discretion if it refuses categorically to impose an exceptional sentence below the standard range under any circumstance. Garcia-Martinez at Id. A court relies on an impermissible basis if it does not consider the request because of the defendant's race, sex religion, or other characterizations. Id. (Emphasis added)

The Sentencing Reform Act of 1981 (SRA) outlines certain mitigating circumstances, in which the court may consider when exercising its discretion to depart from the sentencing guidelines. RCW 9.94A.535. One permissible basis for departure is "the defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired." RCW 9.94A.535(1)(e).

Under State v. Rogers, 112 Wn.2d 180, 770 P.2d 180 (1989), a mental condition may support an exceptional sentence downward as long as it can be established that there exists a mental condition and a connection between the illness and significant impairment of the

defendant's ability to appreciate the wrongfulness of his conduct. Id. at 185. Therefore, if a court refuses to exercise its discretion under the SRA because it believes that the mental illness must be severe enough to excuse the behavior, then a defendant may appeal the denial of an exceptional sentence downward. Garcia-Martinez at Id.

Mr. Oliver challenges the court's denial of an exceptional sentence downward on the grounds that the trial court relied on an error of law and therefore made the denial on an impermissible basis. The trial court stated, "I don't find a basis for an exceptional sentence downward because there is no excuse for what you did. I understand where it came from. That doesn't excuse it." (RP 334) (Emphasis added). The court's statement suggests that the trial court believed that it could not impose an exceptional sentence downward if the mental illness was not severe enough to totally excuse the conduct of the defendant.

Under Rogers , supra, the court is required to evaluate whether a mental illness played a significant role in the behavior of the defendant, rather than totally excuse the conduct. Therefore, by believing that it could not grant an exceptional sentence if the mental illness was not severe enough to totally excuse the conduct, the trial court relied on an

impermissible basis for the denial of the exceptional sentence downward request by Mr. Oliver.

V. CONCLUSION

Based on the foregoing facts and law as set forth about, Mr. Oliver respectfully requests the Court of Appeals to act in the interests of justice, and remand for a new trial or sentencing.

DATED this ____ day of _____, 2005.

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LANA CECILE GLENN, WSBA #17858
Attorney of CLIFTON R. OLIVER